



SASLAW GAUTENG CHAPTER AGM

**“When does a disciplinary hearing commence? The debate
rages on.”**

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THE IMPORT OF THIS QUESTION

- ❖ Disciplinary Codes of employers may be prescriptive as to how long a person can be suspended for, pending a disciplinary hearing
- ❖ For lawyers like me, who believe that a waiver defense can be raised at a disciplinary hearing, this has consequences.
- ❖ In the private sector, Codes state that hearings must be commenced within “a reasonable time.”
- ❖ In the public sector, this question is more vexing because of the prescriptive regulations dealing with when a disciplinary hearing should commence
- ❖ The failure to commence a disciplinary hearing within the stipulated time, a declarator can be sought and the employee can be ordered to return to work.



The question therefore is whether does a disciplinary hearing commence when charges are served or when the charges are put to an accused employee at the convening of a disciplinary hearing.

The Labour Court is divided on this issue. There are two jurisprudential schools of thought, one is *Mgengo v Lekwa Local Municipality* and the other is *Goba v Rand West City Local Municipality J1069/21 ZALCHJHB 301, 20 September 2021*

How has the Labour Appeal Court dealt with this issue, is there legal certainty or the debate rages on?

The Labour Appeal Court itself is divided on this issue, the one position taken in *Matatiele Local Municipality v Shaik And Others (2017)* is at odds with the recently decided *Tshabalala v Moqhaka Local Municipality (2024)*

IMATU obo DANDALA V EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS

The Labour Court reached the following conclusion:

“Therefore, the relevant outer date is the date on which the presiding officer was appointed and not the date on which the hearing sits as contemplated in clause 6.10”

MATATIELE LOCAL MUNICIPALITY V SHAIK AND OTHERS

The Labour Appeal Court reached the following conclusion:

“I would disagree with the proposition that “proceeding with a disciplinary hearing starts when the Municipality appoints a presiding officer.” In my view, in keeping with the context that an employee as affected by a disciplinary hearing, a hearing proceeds only when there is an external manifestation of the Municipality’s intention to proceed with a hearing and this occurs when the charges are formally furnished to the alleged offending employee.”

NTSIMANE V TSHWANE LOCAL MUNICIPAL COUNCIL

The Labour Court, per Moshoana, was emphatic, in his colourful language:

“In my view, it is beyond perspicuous that a disciplinary hearing starts when the charges are furnished to an employee. This, in my view, also settles the question, when does a disciplinary hearing commences within the contemplation of regulation 6(6)(a) ”

Moshoana went on to reject *Mgengo*, based on the doctrine of *stare decisis* (*Matatiele* - LAC).

He found that *Mgengo* was wrongly decided because a suspended employee does not automatically *face discipline*. *In a suspension, disciplinary proceedings may possibly not arise.*

TSHABALALA V MOQHAKA LOCAL MUNICIPALITY

The LAC dealt with Regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers: 2010, which provides for the precautionary suspension of senior municipal employees. Regulation 6(6)(a) Provides:

“If a senior employee is suspended, a disciplinary hearing must commence within three (3) months after the date of suspension, failing which the suspension will automatically lapse.”



Tshabalala was appealing against the judgment delivered by the Labour Court on 12 July 2024 when the Court dismissed an application for a declaratory order that her suspension had lapsed on 31 May 2024 in terms of Regulation 6(6)

Tshabalala was employed as a Municipal Manager, on 1 March 2024 she was suspended with immediate effect, pending an investigation into alleged misconduct.

On 31 May 2024, Tshabalala was served with a notice to attend a disciplinary hearing accompanied by charges.

On 3 June 2024 Tshabalala reported for work, contending that her suspension had lapsed. On 13 June 2024, she filed an urgent application in the Labour Court, contending that a continuation of her suspension beyond a period of 3 months was in breach of her employment contract and Regulation 6(6)(a)

THE LABOUR COURT'S FINDINGS

“A disciplinary hearing commences upon the service of the disciplinary charges and the notice of disciplinary charges. The service of such is an external manifestation that another party is beginning to claim something from the other party. As stated in the Goba matter, it will be incongruent to suggest that the proceedings commence only when the matter sits for trial.

In this case, the disciplinary proceedings against the applicant commenced upon the service of the notice of disciplinary proceedings, which was before the expiry of the three-month period. Her suspension has not lapsed.”



Tshabalala's contention was that the Labour Court erred by failing to draw a distinction between the commencement of the disciplinary proceedings and the commencement of a disciplinary hearing.

The Court found merit to this contention. Disciplinary proceedings in a broad sense may commence with the service of a charge sheet, a disciplinary hearing commences with the appointment of an independent external presiding officer and an officer to lead evidence.

Regulation 10(3) provides:

“The officer leading evidence –

(a) Must commence the disciplinary hearing by reading out the charges to the senior manager.”



The LAC then held that this construction contemplates a disciplinary process that is commenced by the service of charges on the employee and which culminates in the conclusion of a disciplinary hearing.

A disciplinary hearing is an integral part of the disciplinary process of proceedings, it does not constitute the proceedings themselves.

This therefore means that the Regulations contemplate that the disciplinary hearing is convened by the presiding officer and commenced by the reading of the charges to the senior manager accused of misconduct.

This construction was upheld by the Labour Court in *Mgengo*

MGENGO V LEKWA-TEEMANE LOCAL MUNICIPALITY

Nkuta-nkotwana J (as she then was) said the following:

“The issuing of the charge sheet and the notice to attend the disciplinary hearing do not commence the disciplinary hearing but facilitates the process towards its commencement. I agree with Cele J, that the disciplinary hearing can only commence in the actual sitting when the presiding officer officiates over the proceedings or proverbially takes the captainship and navigate the ship. This construction accords with Regulation 10(1)(a) which states that the disciplinary hearing must commence within three months from the date that the Municipality Council resolved to institute a formal disciplinary hearing.



“I get the impression that the purpose of the Disciplinary Regulation is to ensure that the suspension and disciplinary hearing of a senior manager in the Municipality is attended to expeditiously so as to avoid prolonged leadership vacancy which could impede the rendering of the Municipal services. Also, it cannot be overstated that ‘suspension is not a measure that should be resorted to lightly.’ Hence, it is perfectly logical that, once the three-month period of suspension lapses, the Municipal Council is debarred by Regulation 6(6)(b) from extending it. In my view, it is incumbent upon the Municipal Council to act with the speed of a gazelle consequent to a resolution to institute a formal disciplinary hearing against a senior manager.

A CONTRARY VIEW: GOBA V RAND WEST CITY LOCAL MUNICIPALITY

The Labour Court held that a disciplinary hearing commenced when the charge sheet was served on the employee. The grammatical meaning of the word “commence” means to begin or start (in a legal context, by the issuing of a statement of claim or summons or notice of motion),



Van Niekerk JA rejects this reasoning on the grounds that it overlooks the fact that the object of the verb “commence”, as Regulation 10(3)(a) indicates, is the disciplinary hearing and not disciplinary proceedings.

The LAC held further that the error in *Goba* perpetrated by the Labour Court in *Tshabalala* is demonstrated in the Labour Court’s conclusion that *“as stated in the Goba matter, it will be incongruent to suggest that proceedings commence only when the matter sits for trial.”*

Regulation 6 makes no reference to commencement of ‘proceedings’ but commencement of Disciplinary hearing.

A COMMISSIONER'S PERSPECTIVE

In Phetla v City of Matlosana Municipality NWKD2326-24 (27 November 2024) the CCMA Commissioner had to deal with the issue of whether the Acting Manager could legally extend the period of suspension

This dispute was referred by way of an alleged unfair labour practice in terms of s186(2)(b).

The Commissioner followed *Mgengo*, finding that within the three months period of the precautionary suspension, there was no disciplinary hearing nor charges levelled against the Applicant. The precautionary suspension therefore automatically lapsed by operation of law.

IN CONCLUSION

To answer the question of when does a disciplinary hearing commence, one has to make a distinction between the commencement of disciplinary proceedings vs the commencement of disciplinary hearing

In my view, disciplinary proceedings commences with the issuing of the charge sheet. Disciplinary hearing commences with the appointment of a presiding officer and putting the charges to the employee

Is the distinction superficial? No, this matters for purposes of regulation 6 when there is precautionary suspension wherein the disciplinary hearing must commence within 3 months of suspension.

The tide seems to have turned towards the conclusion that disciplinary hearing commences with the appointment of a presiding officer and the putting of charges on the employees.

Time will tell whether the pendulum will swing back to the other position when the issue arise again.



THANK YOU